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Supreme Court of the United States

October Term, 1958

No. 429

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, ET AL.,

Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS

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No. 429

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, *et al*,

Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS

This is a consolidated appeal in the five above-named actions involving common questions of law.

Statement of Facts

(1) James S. Patterson, as Administrator of the Estate of Edgar A. Doody, Jr., filed a libel on July 30, 1947, to recover for the wrongful death of the intestate on August 1, 1945 (A. 2a). Decedent was a machinist employed by the Mechanical Division of the Panama Canal, an unincorporated agency of the United States, as a shore employee. Doody was ordered to board the SS. HANGING ROCK, operated for the War Shipping Administration by War Emergency Tankers, Inc. He was ordered to check and adjust the speed of the forward feed pump turbine in the lower engine room. In the presence of a ship''s officer he commenced his duties. The aforesaid ship's officer started up the turbine, and immediately parts of the governor mechanization broke from the turbine rotor, struck Doody on the left side of his head rendering him unconscious and causing

his death. It is alleged that the machinery was in all respects defective and deceased was caused to suffer injuries and death by virtue of the said defective machinery which broke loose without warning (A. 18a-21a).

Decedent was 33 years of age at the time of his death.

(2) Libelant, Albert Vallebuona, filed a libel on February 23, 1954, for injuries sustained on March 10, 1952, while employed as deckhand with the Motor Vehicle Dispatcher, Cargo Traffic Division, on the Government Barge 6034, then at the Brooklyn Army Base, Brooklyn, New York (A. 65a). Libelant was assigned the duty of securing the aforesaid barge unaided when his foot became enmeshed in the securing line and was forced against the bitt and his said left leg was crushed, necessitating an amputation of his left foot and ankle (A. 61a).

(3) Libelant Melvin A. Hays filed a libel on December 21, 1953, to recover for illness, to wit: tuberculosis, sustained by him while a member of the crew of the SS. Missouri. Liability is predicated upon the existence of conditions aboard the steamship vessel, such as dampness, inadequate and insufficient heating, maintenance and supervision of quarters, and defective ventilating machinery (A. 40a-54a).

(4) Libelant Sterling Eugene Duncan filed a libel on June 29, 1953, to recover for illness, to wit: tuberculosis, sustained by him while employed as a fireman on the SS. Baton Rouge, managed and operated by the Inland Waterways Corporation. Liability is predicated upon the conditions existing aboard the aforesaid vessel, to wit: dampness, insufficient heating, inadequate maintenance and supervision of quarters and defective ventilating mechanisms (A. 33a-39a).

(5) Leonard Lester Sullivan filed a libel on June 29, 1953, for injuries sustained by him on May 4, 1952, while employed by Inland Waterways Corporation in the ca-

pacity of deckhand on board the SS. ILLINOIS, owned and operated by the Inland Waterways Corporation. Libelant had been breaking ratchets in the tow of barges and subsequently returned to the tug while carrying an ax in his hand. As he stepped aboard the vessel at night, and by virtue of the absence of any light whatsoever, libelant's foot was caught in a steel cable, negligently permitted to remain on the deck, creating a hazardous condition, causing him to be swung about and hurled to the deck striking both shoulders against rope coils. Libelant suffered severe injuries to his lower back and legs. Libelant was 21 years of age at the time of the accident (A. 7a-17a).

The VALLEBUONA libel involved a vessel in the public service of the United States and the other vessels were employed in the merchant service.

Libelant Patterson's intestate was a shoreside employee. Libelants Vallebuona, Hays, Duncan and Sullivan were all seamen (A. 19a, 7a, 33a, 4a, 55a).

In each action, respondent is liable by virtue of the negligence of its officers, agents, servants and employees, as well as by virtue of the manifest unseaworthiness of the vessels involved.

In each of the within actions exceptive allegations were filed and sustained, on the authority of *Johansen* v. *U. S.* and *Mandel* v. *U. S.*, 343 U. S. 427, 72 S. Ct. 849 and appeals therefrom duly taken.

Questions Presented On This Appeal

1. Is the United States of America so engaged in the operations of sea-going vessels, as to be chargeable with the consequences of its faults resulting in personal injuries to its employees injured aboard said vessels, in the same manner, and to the same extent, as a private shipowner or ship operators under similar circumstances?

2. Whether or not the vessel used or employed as merchant vessels are subject to the same rule of law as those vessels employed as public vessels?

POINT I

The United States is liable in the operation of vessels to the same extent as a private shipowner with regard to personal injuries sustained by its employees.

The courts below have relied upon *Johansen* v. *U. S.* and *Mandel* v. *U. S.*, 343 U. S. 427, 72 S. Ct. 849, in sustaining the exceptive allegations. The courts felt constrained to follow the aforesaid decisions construing them as holding the remedy under the Federal Employees Compensation Act an exclusive remedy in actions for personal injuries by government employees injured on government vessels, although as hereinafter set forth, both involved public vessels as distinct from merchant vessels.

However, it is the contention of the appellants that circumstances have so changed since the *Johansen* and *Mandel* decisions as to require a reversal, and the adoption of the views expressed in the dissenting opinion. The progress of shipping, both of merchant and public vessels demonstrate conclusively that the views expressed in the aforesaid dissenting opinion more adequately meet the needs of present day public and private shipping.

It is common knowledge, of which judicial notice must be taken, that to an increasing extent the United States has been utilizing the vessels owned and controlled by it, in commercial service. The United States is operating vessels in the same fashion as private steamship company operators and is in direct and continuous competition with such private shipowners. The adoption of the majority view in *Johansen* and *Mandel* creates a condition of distinctly unfair competition as against the private shipowner whose

very existence is essential to the existence and continuance of a sound Merchant Marine so necessary to national defense.

Experience indicates that not merely is there created such a condition of unfair competition aggravated by such a view, but also such doctrine destroys the uniformity in admiralty practice, so long highly regarded as the ideal and principle upon which American Admiralty Law is based. It is hornbook law that such uniformity is an essential concept which the courts will enforce.

The granting of rights to persons injured aboard privately owned vessels not granted to those similarly injured on vessels of the United States, although in identical capacities, destroys this uniformity and is repugnant to American judicial concepts. This is particularly true in times of expanding governmental use of vessels carrying commercial cargoes.

It is a factual matter that seamen are employed for a period of time only and frequently just briefly on a particular vessel, and often are not aware of the particular ownership of a particular vessel on which they may be serving. It is entirely incongruous to hold that his rights are to be determined by the fortuitous circumstance of ownership of the vessel. It is particularly so when he is employed one day on a privately owned vessel and on the next on a government owned one.

The fact that changing circumstances continually require restatement and reexamination of principles, particularly in the Maritime field is shown by the fact that the Federal Employees Compensation Act, 5 U. S. C. 751 et seq., enacted in 1916 was followed by the Jones Act, 46 U. S. C. Sec. 688 et seq., the Suits in Admiralty Act, 46 U. S. C. Sec. 741 et seq., and the Public Vessels Act, 46 U. S. C. Sec. 781 et seq., all designed for expanding needs, and, in addition thereto, the Compensation Act itself was amended in 1949 with a specific exemption for seamen.

The United States Supreme Court has frequently stated that where circumstances are so altered that a reversal of a prior decision is justified to meet changing events, the Court will not hesitate to reverse itself.

> *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, 69 S. Ct. 1317.

In view of the aforesaid, it is respectfully submitted that the aforesaid dissenting opinion in the *Johansen* and *Mandel* cases (*supra*) be adopted.

In that opinion it was stated:

> "The Court, as it must, concedes that these actions are properly brought if the 'literal language' of the Public Vessels Act be adhered to"
>
> • • •
>
> "The Court's holding is as unique as the reasoning behind it. Time and time again during the last thirty years other federal courts have allowed injured employees to take their pick—receive compensation benefits, or sue for damages under the Public Vessels or some other Act.* Moreover, the Court gives the Government precisely what Congress, after debate, refused to give in 1949. Government representatives then asked Congress to make the Compensation Act 'exclusive, and in place of all other liability of the United States.' The House yielded

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* "See e.g., Johnson v. United States, 4 Cir., 186 F. 2d 120. In Gibbs v. United States, D. C., 94 F. Supp. 586, 588-589, District Judge Goodman said: 'From a review of court decisions, it can be categorically stated that no federal court decision, other than the case of Posey v. Tennessee Valley Authority, 5 Cir., 1937, 93 F. 2d 726, has ever held that the FECA affords the exclusive remedy to federal employees. To the contrary, it has been specifically held that the FECA does not bar suits by federal civilian employees against the Panama Railroad, or against the United States under the Federal Control Act of 1918, under the Suits in Admiralty Act, under the Public Vessels Act and under the Federal Tort Claims Act.'"

to this request. The House Report favoring the change stated that when the Compensation Act was enacted in 1916 a 'provision making the Compensation remedy exclusive apparently was then not deemed by the Congress to be necessary.'** The Report also stated that such a provision was now needed because of acts such as the Public Vessels Act which 'in general terms' authorize the bringing of damage suits against the Government. The Senate refused to grant the Government's request and prevailed upon the House to accept the present provision of the Act which states that: 'Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.' This Senate modification of the Bill, as it had passed the House, was offered by Senator Morse and accepted by Senator Douglas who was in charge of the bill. In offering this modification, Senator Morse said: 'Under existing law, Government-employed, seamen have been accorded the right to assert their maritime rights against the United States under the Suits in Admiralty Act and Public Vessels Act * * *.' 'I feel they should not be deprived of benefits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress * * *.' 95 Cong. Rec. 13608. Senator Douglas agreed to the modification, stating that 'The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.' 95 Cong. Rec. 13609.

I do not think this Court should deprive these seamen of rights which the Congress of 1925 gave them and the Congress of 1949 refused to take away." (pp. 858-859).

* * *

** "H. R. Rep. No. 729, 81st Cong., 1st Sess. 14."

POINT II

Government employees injured aboard vessels utilized in the merchant service may recover under the Suits in Admiralty Act and are not relegated to compensation as exclusive remedy.

The decisions in the *Johansen* and *Mandel* cases (*supra*) apply specifically and solely to vessels utilized as public vessels as distinguished from merchant vessels. The Court definitely pointed out that not merely did the injuries occur on public vessels but also affirmed a remand in one case for the introduction of evidence as to whether or not the vessel was a "merchant vessel". (see note 1). The Court further set forth the question in the case as being whether or not the benefits available to a seaman under the Compensation Act precluded suit for damages under the Public Vessels Act and commenced its inquiry from the premise that there was no remedy by way of damages under the Suits in Admiralty Act inasmuch as merchant vessels were not involved.

The case of *Inland Waterways Corp.* v. *Doyle*, 204 Fed. 2d 874 specifically affirmed this distinction and squarely held that the Federal Employees Compensation Act does not provide an exclusive remedy for injury aboard a merchant vessel. The Court distinguished the *Johansen* and *Mandel* cases on the specific ground that the aforesaid cases involved a public vessel and did not apply where the vessel in suit was a merchant vessel. Specific language of the Supreme Court in that decision was referred to by the Eighth Circuit as confirming the essential validity of the distinction.

In said case the Court said at page 877:

> "* * * There are, however, a number of statements in the opinion which indicate that the Supreme Court

> thought that the rights and remedies of such seamen depended upon whether the vessel upon which they were employed was a 'public vessel' or a 'merchant vessel'."

Thereafter, the Circuit Court pointed to portions of the Court's opinion which drew a distinction between seamen on public and merchant vessels and concluded on page 878:

> "Four of the Justices dissented in the Johansen case, and it seems reasonably apparent that the Justices who joined in the majority opinion were of the view that civilian seamen on a merchant vessel owned by the United States were not precluded by the Federal Employees' Compensation Act from electing to sue under the Suits in Admiralty Act for personal injuries received in the line of duty as the result of negligence."

This observation is sound inasmuch as the vessels employed in the merchant service more directly compete with private shipowners and the principle of the necessity of uniformity and of unfair competition would more necessarily require that the seamen of merchant vessels be treated in precisely the same fashion, whether employed on private or government vessels.

The distinction between publicly and privately employed seamen is legally unsound as it does not carry out the intent of Congress.

Congress by successive legislative enactment has directed that the United States Government shall have no sovereign immunity against Maritime tort claims and that no distinction should be made between the rights of seamen injured on government owned or privately owned vessels, or used by the Government as merchant or public ships.

Someone, in one of the government bureaus invented a legal technical device whereby the remedial benefits granted by Congress are sought to be destroyed.

Dean Roscoe Pound vividly portrays the unconscionable consequences attending such evasion of congressional intent.[1] He has quoted from the opinion in the case of *Cowan* v. *Inland Waterways Corporation*, 121 F. S. 683, pointing out that catastrophic injuries are not compensable under the Compensation Act except to the extent of frac-

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[1] Roscoe Pound was dean of Harvard Law School for twenty years, recipient of honorary degrees from seventeen or more universities, author of numerous books and hundreds of articles. He was an outstanding leader in International Congress of Comparative Law in France and a lecturer in India and Sweden.

In 1953 he assumed the duties of editor-in-chief of the NACCA Law Journal devoting his full time to the study and analysis of legal and social problems inherent in personal injury claims.

Cowan v. *Inland Waterways Corp.*, 121 F. Supp. 683 (United States District Court, Eastern District of Illinois, March 13, 1954), per Wham, Chief Judge.

Comment by Dean Pound: "Those who are inclined to object to the activities of lawyers who represent injured persons should reflect upon this case. Here a deck hand who since the date of the injury has been totally and permanently disabled from performing any useful or remunerative employment, is unable to talk plainly or coherently, comprehends very slowly and with great difficulty what is being said to him and is unable to answer questions until after long thought and then very slowly and only in part, who has suffered serious impairment of body and mind, has undergone personality changes, is subject to seizures in the nature of epilepsy which affect the right side of his body and result in loss of consciousness, and since receiving the injury has changed from an ordinarily healthy happy, gregarious individual to a person who is weak, inactive, morose, irritable and depressed, who as a result of the injury suffers from a severe aphasia and from post-traumatic epilepsy with impairment of memory and intelligence, was induced by government agents to sign away his rights in ignorance of them. Had it not been for the lawyers who advised him to return the checks and sue in admiralty, he would have lost the $85,000 "fair and just additional compensation" to which the judge found him entitled (Roscoe Pound—NACCA Law Journal, Vol. 15, p. 274).

tional parts of the wages, and to some extent for amputations, loss of use of a member of the body and death.

According to the opinion by the Court in the *Cowan* case, *supra*, at page 686, the libelant received the following:

> "From September 5th, 1950 to February 7th, 1951, over five months $623.28. Provision for future maintenance at $28.06 per week."

The Court points out at page 689 that the actual loss of earnings was $4,004 per annum, and finds that reasonable compensation for this seaman's injuries is $85,000.

If the decision in the *Johansen* and *Mandel* cases, *supra*, is permitted to stand, it would have the effect of depriving a seaman of his rights and remedies, as demonstrated by the decision in the *Cowan* case, *supra*.

A seaman who has been earning approximately $80 per week, after negligently being crippled for life, is denied any redress for his disability, pain and suffering and is allowed a fraction of his lost earnings.

This Court, having declared that it has the duty to fit the *Public Vessels Act*, *supra*, as intelligently and fairly as possible into the entire statutory system of remedies against the Government, to make a workable, consistent and equitable whole, cannot in fairness or justice, by reverting back to our feeble legal product of 1916, nullify the intent of the subsequent succession of progressive and civilized Congresses of the United States.

An award for only partial benefits or no award at all is seldom upset for the obvious reason the claimant does not have the benefit of counsel and a decision based on factual findings is not reversible.

A widow receives but 45% of the monthly pay of her deceased husband; if she has a child she gets but 40%, however, each child does gets 15% (Section 760).

In the event of injury, the greatest allowance is for the loss of an arm, which is 312 weeks compensation (Section

755). There is a further reduction provided by Section 753, which limits compensation to 66⅔% of the monthly pay during the period of total disability.

Under Section 756, subd. (b) sub-section (2), there is a further limit of $50.00 per month while an injured person is undergoing vocational rehabilitation.

The maximum and minimum monthly payments under Section 756, subd. (c) are from $112.50 a month to $525.00 a month.

The United States put aside its sovereign armor against maritime tort claims in 1920 and further in 1925, granting redress beyond any benefits of the *Federal Employees' Compensation Act of 1916, supra,* and granted remedies which had not been provided for by said Act.

By the factually untruthful and arbitrary expedient of misnaming a seaman and miscalling him a "civilian employee", the power of the mortmain of 1916, the *Compensation Act, supra,* becomes a weapon of destruction for the purpose of nullifying all rights and remedies granted by Congress in 1920 by the *Suits in Admiralty Act, supra,* and then again in 1925 by the Public Vessels Act, *supra,* which remedies were not encompassed by the provisions of the 1916 Compensation Act, *supra.*

Seamen, whose duties and risks are never changed, are arbitrarily mislabeled "civilian employees" for the sole purpose of nullifying substantial, complete and just remedies granted by Congress and restricting them to fractional and limited recovery, contrary to the benefits expressly provided for in the clear and unequivocal language of the *Suits in Admiralty Act* and the *Public Vessels Act.*

There is no more justification for presently reverting back to the 1916 Compensation Act, *supra,* than there would be to revert back to the Rhodian law which provided medi-

cal bills and a limit of ten pieces of gold for a hernia or twelve pieces of gold for the loss of an eye, etc.[2]

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[2] Sir Travers Twiss (1809:1897), Advocate-General to the British Admiralty, in his four-volume quarto of The Black Book of the Admiralty, published by Longmans, London, 1871-76, as The Black Book, traces, in addition to ecclesiastical law, the medieval sea codes.

The ancient version of the Rhodian Sea Law is contained in the treatise by Walter Ashburner of the London Bar (Oxford University Press (1909), followed by the Byzantinum of Norman H. Baynes and H. St. L. B. Moss, experts on the Byzantine period (Oxford, 1948).

Maritime law has steadily sought the goal of uniformity throughout the world and more than any other law has kept pace with civilization from the days of William the Norman landing at Pevensey Beach in 1066.

The first comprehensive approach to alleviate human suffering resulting from industrial and commercial accidents was the law of Great Britain in 1880, prior to which time the doctrine of "violenti non fit injuria" avoided the consequences of a tort feasor's negligence and destroyed an injured workman's right to damages on the basis that he expressly or impliedly agreed to accept the risk.

Ever since Bismarck first evolved the idea of workmen's compensation, which provided fractional, partial and limited redress to the personal injury victims of industry and commerce, civilization has endeavored to improve the plight of such victims by giving them fair, just and adequate financial redress for the damages suffered by such victims.

The benefits throughout the world have steadily improved since the *British Workmen's Compensation Act* of 1897 which lasted until 1904, when, on the report of the Departmental Committee, the compensation for injuries to workmen formed the basis for the *British Compensation Act* of 1906, repealing the Act of 1897.

The committee known as The Holman Gregory Committee endeavored to improve the compensable system of law for personal injury victims, which resulted in the Consolidating Act of 1925, which embodies the present-day principles of the compensation law of Great Britain.

The Workmen's Compensation Acts of Great Britain provide alternative remedy, and the Employers' Liability Act does not prevent the bringing of an action at common law.

The United States bottomed its 1916 Compensation Act on the then existing compensation acts of Great Britain.

Ever since the State of Georgia in 1855 enacted the first compensation law in the United States, and the State of Maryland in 1902

Mr. Justice Reed in the case of *American Stevedores Inc.* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011, stated as follows at page 851:

> "The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act attests to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage. To hold now that the Public Vessels Act does not provide a remedy against the United States for personal injuries would in the future only throw this form of maritime action under the Federal Tort Claims Act: • • •."

See also:

Canadian Aviator, Ltd. v. *United States*, 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901.

See footnote 15 at page 851 American Stevedores, *supra*.[3]

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and the State of Montana in 1909, endeavored to substitute compensation for common law liability, the state courts held such acts unconstitutional. The 1910 compensation law of the State of New York was also held unconstitutional in 1911..

Ives v. *So. Buffalo Ry. Co.*, 201 N. Y. 271.

The first permanent compensation law which covered only certain classes of government employees, was passed in 1908. At the time when the *Federal Compensation Act* was passed, the generally established compensation laws accepted the elective pattern. The employee then had the right, which he does not have since the *Johansen and Mandell* cases, *supra*, to choose between common law and compensation remedies.

[3] See also: *Bailey* v. *Central Vermont Ry.* (1943), 319 U. S. 350, 63 S. Ct. 1062; *Tiller* v. *Atlantic Coast Line R. Co.* (first appeal) (1943), 318 U. S. 54, 58, 64, 63 S. Ct. 444 (second appeal) (1945), 323 U. S. 574, 65 S. Ct. 421; *Tennant* v. *Peoria P.U.R. Co.* (1944), 321 U. S. 29, 64 S. Ct. 409; *Lavender* v. *Kurn* (1946), 327 U. S. 645, 66 S. Ct. 740; *Lavender* v. *Kurn* (1946), 327 U. S. at 653, 66 S. Ct. at 740.

This Court has repeatedly held that none of the aforesaid acts, and that of course includes the Compensation Act of 1916, are to be regarded as an exclusive enactment, treating related situations in isolation, but are to be considered in *pari materia* with all of the other aforementioned Acts, constituting manifestations of a single larger purpose, jointly forming a national system for just and adequate compensation for the damages caused by tortious maritime acts.[4]

This view has uniformly and frequently been expressed by this Court, substantially in the following language set forth in the case of *Johansen* v. *United States*, 343 U. S. 427,

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[4] So the only pertinent comments follow, 66 Cong. Rec. 3560.

"Mr. Robinson: I think the Senator from Delaware should state briefly to the Senate the effect of the bill. It seems to be a measure of considerable importance.

"Mr. Bayard: Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered damages from maritime accidents in which United States vessels are concerned, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

"* * * It would give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go into a district court and prosecute his action. It provides for the appearance of the Attorney General of the United States, and all maritime accident of any kind resulting from the collision and so on, are taken care of. A great deal of money would be saved to the government.

"Incidentally, the bill would accomplish something which should have been done in this country a long time ago. It would give an opportunity to do justice when Federal employees have committed an offense against an individual. * * *

"Mr. Robinson: If enacted, it would relieve Congress of the consideration of a great many measures in the nature of private claims.

"Mr. Bayard: All claims of this nature."

72 S. Ct. 849, at page 853 (together with *Mandel, Admx.* v. *United States*):

> "Under these circumstances, it is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, 'into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.' Feres v. United States, 340 U. S. 135, 139, 71 S. Ct. 153, 156, 95 L. Ed. 152."

Congressional intent, is made crystal clear by Mr. Justice Jackson joined by Mr. Justice Black and Mr. Justice Frankfurter in the dissenting opinion in the case of *Dalehite* v. *United States of America*, 346 U. S. 15, 73 S. Ct. 956, at page 975:

> "Congress has defined the tort liability of the Government as analogous to that of a private person. Traditionally, one function of civil liability for negligence is to supply a sanction to enforce the degree of care suitable to the conditions of contemporary society and appropriate to the circumstances of the case. The Civil damage action, prosecuted and adjusted by private initiative, neither burdening our overworked criminal processes nor confined by the limits of criminal liability, is one of the law's most effective inducements to the watchfulness and prudence necessary to avoid calamity from hazardous operations in the midst of an unshielded populace.
>
> Until recently, the influence of the Federal Government has been exerted in the field of tort law to tighten liability and liberalize remedies." • • •

Further at page 980:

> " • • • The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistiguishable from those performed by private persons. In this area there is no good reason to stretch the legislative text to immunize the Government or its offi-

cers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute.

The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper." * * *

Judge Harlan in the case of *Dixon* v. *United States of America*, 219 F. 2d 10, has traced the progress of Admiralty law from 1902 to 1955 showing the enlightened progress of judicial decisions in treating with persons injured aboard seagoing vessels.

POINT III

The burden of determining whether or not a United States Government owned vessel was a "merchant vessel" or a "public vessel" destroys uniformity of decision in Admiralty law and raises a problem which just cannot be met as a matter of fact.

When *Johansen* and *Mandel* v. *United States* cases, *supra*, were argued, no one called the attention of this Court to the fact that if the *Federal Employees' Compensation Act* provided the exclusive remedy against the United States, that such holdings would revoke substantial parts of the remedies provided by Congress at a later date by the provisions of the *Suits in Admiralty Act, supra*, and the *Public Vessels Act, supra.*

Our courts are interpreting the concepts of negligence in an effort to advance beyond that which Mr. Justice Frankfurter in the case of *Urie* v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018, called "an antiquated and uncivilized basis for working out rights". Such purpose would be de-

stroyed if rights and remedies provided by an enlightened Congress were to be made ineffectual by decisions nullifying such Congressional intent and reverting to the limited benefits provided by the *Compensation Act, supra.*

The historical manifestations of advancing civilization and comprehensive understanding of fair and human treatment of personal injury victims and the desire of civilized nations to provide some redress against disastrous consequences of negligent acts is clearly demonstrated by our Congressional approach and treatment of these problems.

The ghost of the doctrine of "*volenti non fit injuria*" has arisen to destroy a seamen's rights to damages for pain, suffering and financial loss under a new name "civilian employee".

The seaman is not consulted nor does he have the equal opportunity of contractual bargaining of the contract which unjustly and unrealistically labels him "civilian employee."

Realistically and factually, economic pressure and the need of making a living, coupled with the ever hopeful feeling that he would not be the victim of a maritime tort, is the basis for his accepting employment under fractional protection when working on a public vessel, as compared to his right to full indemnity in case of injury when working on a privately owned vessel.

In truth and in fact he does not voluntarily agree to waive many of the substantial rights and remedies granted him by Cougress through the enactment of the *Suits in Admiralty Act* and the *Public Vessels Act, supra.*

It is this mislabelling of a seaman as "civilian employee" that destroys Congressional intent.

Congress has clearly and definitely stated that Federal Compensation Acts do not apply to seamen.

It appears that in spite of the clear and unequivocal language used by Congress, that some of our Courts have not carried out Congressional intent.

Our Courts have erroneously interpreted the *Federal Employees' Compensation Act*, 5 U. S. C. Section 757, subd. (b), which is the October 14, 1949 amendment, as being an exclusive remedy.

Congress has stated that this is not an exclusive remedy, insofar as masters and members of any vessel are concerned.

There does not seem to be any explanation and clearly no justification for interpreting that part of the Federal Employees' Compensation Act, which makes said Act exclusive, in a manner which violates its very meaning and intent.

Congress has stated that this Act shall be exclusive, but not insofar as seamen are concerned.

The part of this Act which our Courts have erroneously failed to take into consideration, reads as follows:

> "PROVIDED, HOWEVER, That this subsection shall not apply to a master or a member of the crew of any vessel." (Title 5, Section 757, subd. (b))

Congress has consistently excluded seamen from the provisions of all Federal Employees' Compensation Acts.

The present Federal Employees' Compensation Act is the Act of September 7, 1916, 39 Stat. 742, 5 U. S. C. A. 751, *et seq.* This Act is the comprehensive compensation act regarding all federal employees.

Prior to 1916, there were three compensation acts limited to specific federal employees. They are as follows:

> Act of May 30, 1908, 35 Stat. 556, covered workmen in manufacturing establishments, arsenals, or navy-yards, or engaged in the construction of rivers and harbor fortifications or in hazardous work under the Isthmian Canal Commission or on reclamation projects;

Act of March 11, 1912, 37 Stat. 74, extended the 1908 Act to employees engaged in hazardous work under the Bureau of Mines or the Forestry Service;

The Panama Canal Act of August 24, 1912, 37 Stat. 560, 48 U. S. C. A. § 1301 *et seq.*, authorized the President to provide compensation for all employees injured while working in connection with the Panama Canal or the Panama Railroad.

The *1916 Act* which is still in force was subsequently amended from time to time in details not pertinent to this inquiry. However, in 1949, for the first time, the remedy was by statute declared to be exclusive subject to exclusions hereinafter set forth. Until that time, there was no statutory enactment making the remedy exclusive.

The amendment of October 14, 1949 changed the existing Section 757, sub-section (a), by adding sub-section (b), which provided that said Act shall be exclusive.

As heretofore pointed out, this exclusive feature was specifically stated by Congress not to include the master or member of the crew of any vessel.

The significance of this amendment is particularly to be noted in view of the fact not stressed in the *Johansen* opinion that the proviso excluding masters or members of the crew is in the precise same sub-section which provided for the exclusivity of the remedy.

This is particularly important in view of Section 303(g) of the Act which provided for the retroactive effect of the 1949 amendment providing that "the amendment made by § 201 of this Act to § 7 under the Federal Employees' Compensation Act, making the remedy and liability under such Act exclusive except as to master or members of the crew of any vessel shall apply to any cause of injury or death occurring prior to the date of enactment of this act". Reference to the said § 303(g) indicates clearly particularly in the absence of commas that the exclusivity provision was

intended by Congress to exclude crew members. Furthermore, the Act also contained (63 Stat. 868, 5 U. S. C. 791-4) an additional overall provision regardless of the exclusivity provision, which states as follows:

> "§ 791-4. Applicability to seamen
>
> (a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in section 1291 of Appendix to Title 50) from the terms of the Federal Employees' Compensation Act, as provided by section 1291 of Appendix to Title 50.
>
> (b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel. Oct. 14, 1949, c. 691, Title III, § 305, 63 Stat. 868."

This showed an overall intent to exclude crew members.

The provisions in § 1291 of the appendix to Title 50 relate to seamen employed through the War Shipping Administration, which specifically excluded seamen so employed from the Federal Employee's Compensation Act and provided for their right to sue for damages.

Additional enactment indicating Congressional intent to regard seamen as *sui generis,* is shown in the Act known as the Longshoreman and Harbor Workers' Compensation Act. Further compensation law (Title 33, U. S. C. § 901, *et seq.*), (§ 902) part of the original Act of 1927 and as unamended to date, defines the word employee in subsection (3) thereof, "the term 'employee' does not include a master or member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net". This defining statute, Act of March 4, 1927, 44 Stat. 1424, has been frequently construed and has never been amended.

The signing of articles or other contract which states that a person becomes a master or a member of the crew, cannot in law, in fact or in justice make such person more

of a seaman than another person doing the identical work, who signs a contract where such seaman is called a shore employee, instead of by his correct name, that of seaman.

The means whereby seamen working on Government vessels have been deprived of the rights accorded to other seamen doing identical work is by having such seamen designated "civilian employees".

We submit it is time to correct this injustice and to give to the expression of Congress its correct and honest meaning.

There is no justification for giving to words in ordinary usage interpretation contrary to its plain meaning.

The approach to personal injury damage claims on the basis of Workmen's Compensation has been progressive and necessary but does not provide an adequate remedy at the present time.

Said Act provided for partial redress in the event of death or total or partial disability and limited redress for the loss of a member or function of the human body.

Said Act made no provision and did not take into consideration the most serious elements of damage. No provision was made for compensation of permanent injuries, pain, suffering, impairment of earning power, loss of opportunity for advancement, injury to the central nervous system or for the loss of the differential of earnings between the actual loss of the injured person and the fractional amount allowed under the Act, etc.

This failure and inadquacy of remedy was corrected, insofar as seamen were concerned, by various acts.

On March 4, 1915, Congress enacted a Seaman's Welfare Act which was amended June 5, 1920, commonly known as the Jones Act, *supra*. The provisions of said Act extended to seamen the common-law right or remedy in cases of personal injury to railway employees. The same year, and on March 9, 1920, by enacting the Suits in Admiralty

Act, *supra*. Congress expanded seamen's rights to include actions against merchant vessels of the United States and five years later to include the same rights against Public Vessels.

After the decisions by the Supreme Court of the United States in 1917 in the cases of *New York Central Rail. Co.* v. *White*, 243 U. S. 188; *Hawkins* v. *Bleakly*, 243 U. S. 210, and *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, that Congress, in 1920, provided rights and remedies beyond the 1916 Compensation Act by enacting the *Suits in Admiralty Act, supra*, and five years later, by enacting the *Public Vessels Act, supra*.

This action of Congress did enlarge the remedies of seamen rather than restrict them or limit or give only fractional relief. This view is demonstrated by the amendment in 1939 of the *Federal Employers' Liability Act*, said act constituted the basis of the *Jones Act*, 46 U. S. C. 688, the *Suits in Admiralty Act, supra*, and the *Public Vessels Act, supra*.

The amendment of the Employers' Liability Act, 53 Stat. 1404; 45 U. S. C. sec. 51; Sec. Rep. No. 661, 76th Cong., 1st Sess. 2 (1939): "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations."[5]

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[5] *Baird* v. *New York Cent. R.R.* (1949), 299 N. Y. 213, 86 N. E. (2) 567; *Ericksen* v. *Southern Pacific R.R.* (1952), 39 Cal. (2d) 374, 246 P (2d) 642, *Harris* v. *Missouri Pacific R.R.* (1944), 158 Kan. 679, 149 P (2d) 342, *Trucco* v. *Erie R.R.* (1946), 353 Pa. 320 45 A (2d) 20, *Albright* v. *Pennsylvania R.R.* (1944), 183 Md. 421, 37 A (2d) 870, *Pigque* v. *Baldwin* (1942), 154 Kan. 707, 121 P (2d) 183, *Shanks* v. *Union Pacific R.R.* (1942), 155 Kan. 584, 127 P (2d) 431, *Great Northern Ry.* v. *Industrial Comm'n* (1944), 245 Wis.

The uncertainty which now exists as to whether a seaman (unrealistically and improperly labelled "civilian employee") is entitled to the benefits of the *Suits in Admiralty Act, supra,* and/or the *Public Vessels Act, supra,* arises from the consideration of the nature of the cargo, rather than the nature of the employment.

The method of determining whether a particular employee was injured and killed in interstate commerce, which gave rise to many conflicting decisions, was cured by the expression of the intent of Congress in the amendment of the Employers' Liability Act, *supra,* by the 76th Congress.

The holding in *Pedersen* v. *Delaware, L. & W. R. Co.* (1913), 229 U. S. 146, 33 S. Ct. 648, laid emphasis on the word "commerce".

375, 14 NW (2d) 152, *St. Louis, S. F. Ry.* v. *Wacaster* (1947), 210 Ark. 1080, 199 SW (2d) 948, *Robinson* v. *Penn R. Co.* (1953), 113 F. Supp. 863, *Ford* v. *Louisville, etc. R.R.* (1946), 355 Mo. 362, 196 SW (2d) 163.

A repairman working in the back shop on locomotives and their various parts which had been withdrawn from service for major overhauls and repairs; a tie inspector who went to the premises of a lumber company to inspect ties and determine whether his employer railroad would buy them and use them later in an interstate roadbed; an employee loading barrels of oil to be used in filling railroad lanterns and machines; a blacksmith's helper engaged in making locomotive parts; a guard at terminal; an employee whose duty it was to clean up papers and other debris around the depot and the railroad tracks; a flood control worker whose duty it was to fill sand bags and place them on a flat car which took them to where they were needed to protect the tracks fror existing flood waters; a laborer around certain ore docks, who served as a guard during the months of October to May when they were not in use or service of any kind, although they were used for interstate commerce from May to October; a rodman who was a member of a surveying crew and who spent about 50 per cent of his time in interstate operations even though he was at the time of the accident engaged solely in intrastate work; and a carpenter who ordinarily worked on railroad bridges carrying interstate commerce but who was employed at the time of the accident, and for two months before, on a bridge carrying solely intrastate traffic.

In the case of *Shanks* v. *Delaware, L. & W. R. Co.* (1916), 239 U. S. 556, 36 S. Ct. 188, Congress interpreted the test of employment on a more restrictive measure, that is, whether the employee at the time of injury was "engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

Congress expressed its disagreement with this artificial distinction by stating in the Act of 1939, *supra*, that the basis of an employee's right to sue for damages depended on whether or not "any part of whose duties" shall be in the furtherance of interstate commerce, "or shall, in any way directly or closely and substantially, affect such commerce."

It is, therefore, crystal clear and beyond any honest suggestion to the contrary, that it is the nature of the work and not the labelling, artificial, unrealistic designation by the employer, or the nature of the employer's business or activities that determines the right of an injured employee to the benefits created by Congressional enactment.

This liberal intent of Congress not only is clearly demonstrated by its own unequivocal language, but is supported by the interpretation of the cases considered by the Supreme Court of the United States since the *Shanks* case, *supra*.

The liberal trend of Congressional intent in providing full and adequate remedy and redress as recognized in *Tuten* v. *Atlantic Coast Line R. Co., supra; Bailey* v. *Central Vermont Ry., supra; Tennant* v. *Peoria P.U.R. Co., supra; Lavender* v. *Kurn, supra,* and *Stone* v. *New York, C. & St. L. R. Co.* (1953), 344 U. S. 407, 73 S. Ct. 358, reversing (Mo. Sup. 1952), 249 S. W. (2d) 442 is not limited to railroad torts.

In view of the uniformity of recent decisions eliminating technical, theoretical and unrealistic distinctions in Admiralty causes, there seems to be no justification for

the existence of a distinction as to the liability of a vessel carrying one type of cargo from that of a vessel carrying another type of cargo of a Government vessel carrying the same cargo as a private ship.

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872; *Rogers* v. *United States Line Company*, 205 Fed. 2d 57, 347 U. S. 984, 74 S. Ct. 849; *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202; *Petterson* v. *Alaska S.S. Co.*, 205 Fed. 2d 478, aff'd 74 S. Ct. 601; 347 U. S. 396, rehearing denied, 74 S. Ct. 848, 347 U. S. 994; *The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760.

The same argument applies with equal force to the absence of any justification for making a distinction between one seaman and another, injured under identical circumstances and during the performance of identical services, by the mere expedient of designating the seaman as a "civilian employee".

No one can honestly deny that the sole purpose of utilizing the term "civilian employee" to a shipworker performing the work traditionally performed by seamen, is to reduce the amount of the Government's damages to a sum less than that which a private shipowner would be liable for under similar circumstances.

It is common knowledge that the United States of America is engaged in the business of merchant shipping, carrying cargo of a public and private nature interchangeably and simultaneously, differing on the same ship from trip to trip.

It is unrealistic and burdensome, if not impossibility of performance to require a personal injury victim to know or ascertain the fortuitous nature of a ship's cargo on a particular trip. To impose such knowledge as a condition precedent for predicating a civil action on a maritime tort is confiscatory of rights granted by Congress under the Suits in Admiralty Act, *supra*, the Public Vessels Act, *supra*, for such information is not available to him.

It is repugnant to our American concept of justice to even entertain the suggestion that Congress granted to a class of employees engaged in commerce by rail greater benefits than to those engaged in commerce by ship.

Congress has decreed that the United States when engaged in the business of maritime shipping is liable for the consequences of its maritime torts to the same extent as any private shipowner. Suits in Admiralty Act, *supra*, Public Vessels Act, *supra*.

The United States Government has gone into the business of merchant shipping. Its legal department through its Maritime Division has endeavored to nullify Congressional waiver of sovereign immunity by limiting its liability to a fraction of the damages for which a private shipowner would be held liable under similar circumstances, through the legal legerdemain and arbitrary mislabelling of a seaman as a "shoreside employee".

By this method, ancient and confiscatory methods have been invoked to utilize unrealistic values in measuring present day personal human catastrophe and to reduce to a fraction and revoke and otherwise limit substantial benefits granted by Congress in clear and unequivocal language.[6]

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[6] Samuel B. Horovitz (Harvard A.B., LL.B., 1922), author of Practice and Procedures under the Massachusetts Workmen's Compensation Law (1930), and of Horovitz on Workmen's Compensation (1944). For many years Workmen's Compensation attorney for the Boston Legal Aid Society and the Massachusetts State Federation of Labor, Associate Member of the International Association of Industrial Accident Board and Commissions, Editor-in-Chief, NACCA Law Journal. Contributor of many articles on workmen's compensation to law journals. Lecturer on Workmen's Compensation, Howard Law School, Washington, D. C., Simmons College, etc.

Horovitz at NACCA, Volume 3, page 16, referring to recipients of compensation awards says: "And even if he wins his compensation case he all too often discovers that the amounts specified in the compensation law are today so low and limited that he eventually becomes a public charge. For example, in many states, loss of both

legs or both eyes or both arms bring payments of less than $12,000.00 payable in below-subsistence weekly rates of $20.00 to $25.00 weekly, even for laborers with large families * * *. For the seriously injured worker this great social insurance has become a veritable nightmare."

Samuel B. Horovitz demonstrates in his footnotes in the NACCA Law Journal, Vol. 3, pages 25 to 30 inclusive, that where compensation is the exclusive remedy, the injured worker stands 60% of the loss, that is, not taking into account pain, suffering, permanent injury and other disabilities not recognized under compensation law.

The early cases tended to be strict; but the later and modern trend was and is to construe the acts broadly and liberally, to protect the interests of the injured worker and his dependents. For that reason courts throughout the compensation-world refuse to follow narrow, older cases. Judges today realize that most acts arbitrarily cut down the individual worker's monetary opportunities for recovery by giving far smaller amounts than currently awarded in successful common law and other cases, and that even in successful compensation cases, the employee actually suffers the greater part of the financial load. Courts recognize that in close or borderline cases it is better to put part of the loss on the insurer, and hence on the ultimate consumer of the product or services, than wholly upon the injured employee or his family, who rarely can pay it and must pass it on to charity; that as one of the purposes of workmen's compensation was to keep injured workers from becoming public charges, a reasonable, liberal and practical construction is preferable to a narrow one, and that these acts are for the giving of compensation, not for the denial thereof. It is insurance of a social character, and not to be administered on narrow common-law principles applying to other types of insurance. Care must be exercised lest long judicial habits in tort cases allow judicial thought and opinion in compensation cases to be too much influenced by outmoded or modified factors of decision

Furthermore, contrary to popular opinion, it is the injured worker, not the employer, who actually suffers the greater part of the financial load. Even in successful compensation cases the best estimate is that the worker stands at least 60% of the wage loss. This is due to many factors: (1) During waiting periods employees get no compensation whatever and carry that entire load. The great majority of injuries are, fortunately, for industry, of short duration (estimated at an average of 19 days in manufacturing)—see Bulletin No. 889, U. S. Dept. of Labor p. 1 (1945); (2) most acts provide that the weekly compensation shall be 42½ to 70 per cent of the weekly wages, with an additional limitation that the maximum weekly compensation payments shall not exceed a given amount, usually $15 to $25. An employee getting a wage of $80 weekly, and recovering

a maximum weekly compensation of $20, therefore stands $60 weekly of the loss, or 75 per cent of the wage loss; (3) similarly, many acts put a maximum limit on medical payments, some as low as $300, or not exceeding a given period of weeks—the entire excess falling on the employee.

The best available recent estimates is that actually the worker stands 60 per cent of the loss, as they receive "in the aggregate about 40 per cent of their wage loss, based upon wage earned before the injury. That is because we pay as compensation only a percentage of the wage which is lost * * * subject to a maximum wage basis," per Harry A. Nelson, director of Workmen's Compensation, Wisconsin Industrial Commission, Bull. No. 53 U. S. Dept. of Labor pp. 30, 31 (1941 Convention I.A.I.A.B.C.).

Seamen's unions and railroad unions feel they are better protected under existing federal tort laws than under proposed compensation acts—see Bulletin No. 869, U. S. Dept. of Labor, Work-Compensation and the Protection of Seamen (1946, 93 pages).

Furthermore, compensation legislation has not kept up with the depreciated value of the dollar, while courts and juries, unfettered by the need of legislation have, for that very reason, allowed increased verdicts. (See above cases in which some of the courts expressly took judicial notice of the value of the dollar.)

Canada; *Bowers* v. *Hollinger, et al.* (1946), 4 D. L. R., 186 (Ontario High Court), per Urquhart, J., discussing transportation as incident of employment, but upholding common law suit under the particular circumstances.

Industrial Commission of Ohio v. *Weigrandt*, 102 Ohio St. 1, 130 N. E. 38 (1921)—"that upon just and scientific considerations such injuries should be regarded as a charge upon the business upon which the employees are engaged" (horseplay held compensable).

Phil Hollenbach Co. v. *Hollenbach*, 181 Ky. 262, 204 S. W. 152 (1918) "should be charged to and absorbed by the business."

Post v. *Burger & Gohlke*, 216 N. Y. 544, 553, 554, 11 N. E. 351, Ann. Cases 1916 B. 158 (1916).

Kansas City Fibre Box Co. v. *Cornell*, 5 F. 2d 398, 43 A. L. R. 478 (8 Cir. 1925)—Kenyon, Cir., J.: "Where machinery is destroyed, or injured in industry, it is a part of the burden of industry to supply or repair such machinery. Why should the same theory not apply as far as practicable, where human machinery is injured in carrying out the work? There is economic loss in both cases."

See Grason, J., in *Baltimore Steel Co.* v. *Burch*, 49 A. 2d 542, 544 (Md. 1946)—it was intended to relieve workers "from the hazards of industrial employment and to protect the public from the care and expense resulting from human derelicts due to accidents" in industry.

To "prevent injured workmen from becoming public charges" per Neil, J., in *Griffith* v. *Goforth*, 184 Tenn. 56, 195 S. W. 2d 33, 38 (1946).

Per Christianson, J., in *Thoresen* v. *Schmahl*, 222 Minn. 304, 24 N. W. 2d 273, 276 (1946)—literal construction not used when it results in absurdity or tragic incongruity; the broad and liberal construction is in the interest of workmen to carry out its policies.

Accord: Simmons, C. J., in *Clark* v. *Village of Hemingsford*, 147 Neb. 1044, 26 N. W. 2d 15, 22 (1947)—"liberally construed and its beneficent purposes not to be thwarted by technical refinement or interpretation."

Accord: Riner, C. J., in *In re Jensen* (*Jensen* v. *Manning & Brown Inc.*), 178 P. 2d 897, 900 (Wo. 1947)—"to be reasonably and liberally construed."

Accord: Moulton, C. J., in *Wilkins* v. *Blanchard-McDonald Lumber Co.*, 52 A. 2d 781, 783 (Vt. 1947)——"The Act is to be construed liberally to accomplish the humane purpose for which it was passed."

Accord: Hickman, C. J., in *Hood* v. *Texas Indemnity Ins. Co.*, 209 S. W. 2d 345 (Tex. 1948), reviewed in 2 NACCA Law Journal, 47-51 (Nov. 1948)—"should be liberally construed."

See Dodd, W. F., *supra*, pp. 687, 688, citing E. H. Downey (writing in 1920 or so): "* * * industry bears less than half of the direct monetary cost of work injuries. In Pennsylvania, New Jersey, Colorado, West Virginia, and other low benefit states compensation does not amount to one-fourth of the wage loss."

The industry and not the individual workman should, to a large extent, bear the burdens of accidents—*In re Jensen* (*Jensen* v. *Manning & Brown, Inc.*), 178 P. 2d 897, 900 (Wyo. 1947), per Riner, Ch. J.

Morgan, J., in *Goodyear Aircraft Corp.* v. *Industrial Commission*, 62 Ariz. 398, 158 P. 2d 511 (1945) charge against industry to the same extent as repairs to a broken machine.

Birchett v. *Tuf-nut Garment Manufacturing Co.*, 205 Ark. 483, 169 S. W. 2d 574, 577, 579 (1943)—policy is to put loss on "ultimate consumer" and not on employee. Should construe liberally for those "who toil for their daily bread".

R. Marvin Everett in the Law Quarterly Review, Oxford, England, July 1946, Vol. 62, page 300, 301, "certainly the higher tribunals both in England and in America seemed to have lived up to the dictum 'that this is an Act for the giving and not the withholding of compensation.'"

"It should be administered substantially as insurance of social character"—*Herbert* v. *Ford Motor Co.*, 285 Mich. 607, 610, 281 N. W. 374, 375 (1938).

Congressional intent clearly expressed and extensively interpreted by the Supreme Court of the United States, cries for the revocation of the barriers which have been asserted for the purpose of nullifying the benefits granted to seamen by Congress.[7]

One cannot escape the brilliant interpretation of the law by the late Judge Holmes, clearly expressing the intent of Congress to hold vessels engaged in public service liable for the consequences of maritime torts. *The Western Maid, The Liberty, The Carolinian*, 257 U. S. 419, 66 L. Ed. 299, 42 Sup. Ct. Rep. 159.

The applicability of maritime law on vessels owned by the Government, employed either for Government purposes or as merchant vessels, and the manner in which such law should be applied is stated by Judge Holmes in *The Western Maid, The Liberty, The Carolinian, supra.*

[Although liability could not be held, insofar as the tort antedated the waiver of sovereign immunity by the Government, the language is most instructive. Judge Holmes stated:]

> "But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."

The dissenting opinion in said cases contains the following comments:

> "In Rounds v. Cloverport Foundry & Machine Co., 237 U. S. 303, 306, 59 L. ed. 966, 967, 35 Sup. Ct. Rep. 596, it is said, Mr. Justice Hughes delivering the opinion of the court, 'The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor

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[7] See NACCA Law Journal, vols. 3 and 4. "The Litigious Phrase 'arising out of employment'", vol. 3, p. 15 and vol. 4, p. 19 et seq.

> or offending thing,—in which the vessel is itself "seized and impleaded as the defendant, and is judged and sentenced accordingly." ' "

Judge Holmes further stated:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow."

Since the passage of the *Suits in Admiralty Act* and the *Public Vessels Act, supra,* the applicable law at the present time can be expressed in the language used in the dissenting opinion in *The Western Maid, et al., supra,* back in 1922, which appears as follows:

> "So again in Workman v. New York City, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, where it is said, Chief Justice White delivering the opinion of the court, after an exhaustive review of cases, such as he usually gave, 'It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction.' In view of this it is difficult to understand how it can be said that there was nothing that case decided contrary to the conclusion in these cases."

Many federal Judges, universally acknowledged as authorities on Admiralty law, have consistently considered a vessel as an independent offending entity. These views, taken in conjunction with the expressions of Congress by the passage of the *Jones Act, supra,* the suits in *Admiralty Act* and the *Public Vessels Act, supra,* must lead to the inescapable conclusion that a ship and its owner, as a matter of justice and as a mandate of Congress, should be charged with the full and not patial consequences of its torts.

The following is a quote of footnote "1" in the case of *The Western Maid, et al., supra*:

> "The U. S. S. Hisko, U. S. S. Roanoke and U. S. S. Pocahontas (Circuit Judge Manton, S. D. N. Y.) (March 17, 1921, unreported opinion annexed to brief);
>
> The U. S. S. Newark (District Judge Knox, S. D. N. Y.) (March 18, 1921, unreported opinion annexed to brief);
>
> The U. S. S. Sixaola (District Judge Mayer, S. D. N. Y.) (April 21, 1921, unreported opinion annexed to brief);
>
> The F. J. Luckenbach, 267 Fed. 931; The Liberty, now before this court; The Carolinian, 270 Fed. 1011, also now before this court.
>
> Also: The Florence H., 248 Fed. 1012; The Gloria, 267 Fed. 929; The City of Philadelphia, 263 Fed. 234. Counsel also cites: The Tampico, 16 Fed. 491; Thompson Navigation Co. v. City of Chicago, 79 Fed. 984; Johnson Lighterage Co., 231 Fed. 365; The Attualita, 238 Fed. 909; The Luigi, 230 Fed. 493; The Othello, 5 Blatchf. 343."

Conclusion

Congress, by its amendment to the Federal Employers Liability Act in 1939, *supra*, declared that the test of availability of rights and remedies under said Act was to be governed by the nature of the worker's duties and not the employer's designation.

The Supreme Court of the United States has consistently held that related remedial acts will be considered in *pari-materia* to carry out Congressional intent.

The plain meaning of the 1949 Amendment of the Compensation Act excludes seamen from the provisions thereof.

This Court has fostered the view by repeated decisions that civilization demands a realistic and factual evaluation

of a seaman's personal injury claim and will not permit legalistic jugglery to deprive a seaman of any of his rights or remedies.

The realistic approach to the entire problem is summarized by Judge Learned Hand in the case of *Keen* v. *Overseas Tank Corporation*, 194 F. 2d 515, c.d. 72 S. Ct. 1061, 343 U. S. 966, cited with approval in *Boudoin* v. *Lykes Bros. Steamship Co.*, 75 S. Ct. 382, 348 U. S. 382.

In the *Keen* case, *supra*, the Court stated at page 518:

> "Substantially all maritime risks are insured, and if we must suppose that the addition of this risk will show in the premiums, in the end it will be likely also to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships. As we have said, this has been the uniform practice when the injury has arisen from defects in material; and we have yet to learn that hull and gear are less likely to fail under stress than those who handle both."

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